No. 945

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JOHN F. DAVIS, CLERK

IN THE

...me Court of the United States

OCTOBER TERM, 1966

...NCE P. HICKEY, GEORGE D. SULLIVAN, JR., ...TON H. YOUNG, and THOMAS R. BENZ,
Petitioners,

vs.

...INOIS CENTRAL RAILROAD COMPANY,
an Illinois corporation,
Respondent.

PETITION FOR REHEARING OF THE DENIAL OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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McCORNICK AND HENDERSON, INC., CHICAGO

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LAWRENCE P. HICKEY, GEORGE D. SULLIVAN, JR., BURTON H. YOUNG, and THOMAS R. BENZ,
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Your petitioners urge that because of the pendency before this Court of the cause entitled *Stella Hughes* v. *State of Washington,* October term, 1966, No. 339, *certiorari recently granted,* a rehearing should be granted, or in the alternative, that this Court defer ruling upon the instant petition until after its decision in the *Hughes* case.

The principal issue in the *Hughes* case is fundamentally identical to that in the instant case. This conclusion is demonstrated by considering point 3 of the Respondent's (State of Washington) "Reply to Memorandum for the United States as Amicus Curiae." Point 3 (pp. 8, 9 of said

Reply) is directed at the key issue raised by the Solicitor General of the United States, and succinctly states this issue:

> "When Washington was admitted to the Union as a state it became owner of all tidelands within its boundaries. Its ownership was not by grant or conveyance from the federal government but arose entirely as an incident of state sovereignty. *Pollard* v. *Hagan*, 3 How. 212, 230 (1845). We see nothing in this fact to sustain the government's argument, *Memorandum*, pp. 7, 9, that the state is *therefore powerless to modify the common law* moving boundary rule as to these tidelands." (Emphasis added)

The government's argument that the State of Washington is powerless to modify the common law moving boundary rule as to these tidelands is based upon the fact that under *Pollard* the State of Washington's rights were established at the time it became a part of the Union, subject to the common law as it existed prior thereto. As stated by the government in its Amicus Curiae Memorandum, page 9, "The common law rule governing the sovereign's ownership of the tideland (see *supra*, p. 7) as absorbed by the original States and reaffirmed by this Court, has of necessity, therefore, become the constitutional yardstick of the title obtained by all the subsequent States."

Illinois was admitted to the Union as a state on the same basis as Washington. Illinois became the owner of all submerged lands in Lake Michigan within its boundaries upon its admission to the Union. Its ownership of these submerged lands was not by grant or conveyance from the Federal government but arose entirely as an incident of state sovereignty under the doctrine of *Pollard* v. *Hagan*, 3 How. 212 (1845). This Court so held in *Illinois Central Railroad Co.* v. *Illinois*, 146 U.S. 387 (hereinafter referred

to as the "Lake Front Case") and in doing so expressly relied upon *Pollard.* See 146 U.S. at page 435.

Accordingly, at the time Illinois obtained the ownership of these submerged lands, it did so on an equal footing basis with the original thirteen states under the doctrine of *Pollard.* The common law existing even prior to the creation of the original thirteen states, as "absorbed" by these states and reaffirmed by this Court in the *Lake Front Case,* 146 U.S. at 436, 437, 453, impressed a trust in favor of the People upon the submerged lands in the Ocean which prevented the Sovereign from doing anything which would cause the submerged lands to be lost to the People, except in the public interest. This common law trust was impregnated upon the title of all the original thirteen states and, under *Pollard,* equally impregnated the title of the State of Illinois; just as in the case of *Hughes,* the rights of the State of Washington in tidelands were fixed by the common law then in existence when the State was created pursuant to the *Pollard* doctrine, as argued by the Government's Memorandum in the *Hughes* case.*.

If this Court should decide the *Hughes* case in the manner contended for by the Solicitor General of the United States, the State of Washington would be powerless to modify the

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* The national importance of the question is highlighted again by the Solicitor General at page 4 of his Memorandum:

> "Nor is there any apparent reason why, in Washington or elsewhere, the principle should be limited to tidelands; it could be applied with consistency of logic to the shifting banks of rivers and lakes owned by a State."

Compare also *Illinois Central Railroad Co.* v. *People of the State of Illinois,* 146 U.S. 387 at 435-36:

> ". . . [T]here is no reason or principle for the assertion of dominion and sovereignty over an ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes."

common law pertaining to these tidelands. In such an event, it would be clear that the State of Illinois, and its Courts, likewise would be powerless, as the Court below did in the instant case, to modify under State law the aforesaid common law trust imposed by this Court in the *Lake Front Case,* 146 U.S. 387, upon the State's title to its submerged lands in Lake Michigan. Obviously, laches and estoppel arising out of malfeasance or misfeasance of State officials cannot, consistent with the common law trust, cause the State to lose title to its submerged lands. *Cf. United States* v. *California,* 332 U.S. 19, 17, 20, 21.

The Illinois Supreme Court in the instant case has refused to decide whether, as petitioners contend, the *Lake Front Case,* 146 U.S. 387, vested title to the lands in question in the State. It refused to do so on the theory that the State was barred by laches and estoppel from asserting this title because State officials failed to assert the State's title to the lands in question in spite of the fact that it was their fiduciary and constitutional duty to protect the State's title. Such action by the Illinois Supreme Court is repugnant to the common law trust recognized by this Court in the *Lake Front Case. As we have observed above, such trust is binding upon the State Court because the State took the title to the submerged lands under Pollard subject to such trust when the State was created.*

The net effect of the Illinois Supreme Court decision in the instant case is to follow the argument of the State of Washington and thereby to modify the common law trust doctrine concerning submerged lands of all of the Great Lakes.

We respectfully emphasize that involved in the instant case is not merely the title to miles of critically important

lakefront lands in the City of Chicago worth perhaps half a billion dollars. The Great Lakes contain several thousand miles of shoreline, adjacent to which live approximately one-third of the population of the United States. All of these States took the title to their submerged lands in the Great Lakes under the doctrine of the *Pollard* case. If the decision of this Court in the *Hughes* case follows the contention of the Solicitor General of the United States, all of these Great Lakes States will be affected.* Moreover, the same decision will affect all of the navigable waters in the interior of the United States, such as navigable rivers and Lakes other than the Great Lakes.**

If *Hughes* is decided favorable to the government's position in that case, and a similar decision is not reached in the instant case, a serious void and doubt will exist in the important field of federal-state confrontations.

Because of the important common issue involved in both the instant case and *Hughes*, it would appear desirable and

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* A current problem of national interest is the allowing of private interests in the State of Indiana (commonly known as "Burns Ditch") to fill and extend the shorelands of Indiana into Lake Michigan and the militant objections thereto by civic groups. It appears that one or the other party will proceed to this court with virtually the same question.

** "The past twenty years have seen a surge of interest in boundaries of sea and land, in 'tidelands' or 'submerged' lands. The boundary question became an early example of recent federal-state confrontation in the Supreme Court; the advances in technique and equipment to mine in the seas and fill flats coincided with shortage of land, the needs of industry for waterfront sites, the increase in value of beaches and shores for residence and recreation, and collision with conservation interests." American Bar Association Journal, Volume 53 at page 272 (March 1967).

appropriate to defer a decision on this Petition for Rehearing until after this Court's decision in the *Hughes* case.

Respectfully submitted,

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ANNA R. LAVIN
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CERTIFICATE PURSUANT TO RULE 33 OF THE RULES OF THIS COURT

I do hereby certify, as an attorney in good standing before this Court, that the above stated Petition for Rehearing contains substantial grounds amenable to this Court's jurisdiction not previously presented; and that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the substantial grounds described as aforesaid.

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LEONARD R. HARTENFELD
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